

UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, D.C.

DEPT OF TRANSPORTATION  
DOCKETS

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IN THE MATTER OF  
MOLE-MASTER SERVICES CORPORATION

FAA Docket No. CP08SO00012  
(Civil Penalty Action)

DMS NO. FAA-2008-0691

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before the Decisionmaker

**COMPLAINANT'S REPLY BRIEF**

**COMES NOW** Complainant, by and through its undersigned attorney, and in accordance with Rules of Practice in FAA Civil Penalty Actions (14 C.F.R. §§13.16(j) and 13.233(a)) submits this brief in reply to Appellant Mole-Master Services Corporation appeal brief dated April 1, 2009,<sup>1</sup> as follows:

A hearing in the above-styled matter was held by Administrative Law Judge Isaac D. Benkin on January 29, 2009, in Louisville, Kentucky. On February 10, 2009, Judge Benkin issued his Initial Decision Assessing Civil Penalty of \$25,000 against the Appellant. The Appellant filed its Notice of Appeal on February 20, 2009, and thereafter perfected its appeal with a brief dated April 1, 2009. The Appellant states that "this case is essentially a penalty case," but argues that the findings of fact are not supported by the evidence; the conclusions of

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<sup>1</sup> The Respondent's (Appellant's) appeal brief was received in the Office of the Regional Counsel on April 7, 2009.

law are not in accordance with law, precedent or policy; and that the ALJ committed prejudicial errors.

Appellant first argues that it was error for the Judge to allow the Complainant to amend its Complaint at the beginning of the hearing to delete a reference that the shipment was leaking. The procedural rules allow a party to amend its pleadings prior to a hearing with the approval of the administrative law judge. 14 C.F.R. §13.214(b)(2). The ALJ heard arguments from both parties regarding the motion and then granted the Complainant's motion to delete the allegation. Appellant further argues that because the Notice of Proposed Civil Penalty alleged that the shipment had leaked and the Notice set the penalty at \$30,000, the amendment should have worked to reduce the penalty accordingly. However, witness Beverly Farris testified that she had not discovered the shipment leaking (TR. 111:19) and that the penalty of \$30,000 was calculated on the basis that the shipment had not leaked (TR. 83:18)(Complainant Exhibit 1, page 3). The Complainant was correct not to have amended the sanction, and it was correct to have simply amended the scrivener's error of alleging that the shipment had leaked. The Judge was correct in finding that the \$30,000 penalty was not calculated on the basis that the shipment had leaked. (Initial decision at footnote 3).

The Appellant next argues that prejudicial error occurred when the Complainant did not call witness Special Agent Kenneth Holman. The Complainant chose to rely upon the testimony of the investigating Special Agent as its sole witness because Special Agent Kenneth Holman who had written the Enforcement Investigative Report could not attend the hearing due to weather conditions. The Complainant bore its burden of proof in offering the testimony of Special Agent Beverly Farris and the exhibits introduced through her. The Appellant did not list Special Agent Holman as its witness nor did Appellant call Special Agent Holman as a witness. Appellant

appears to argue that either, 1) a negative inference should be drawn by the Complainant's not calling Special Agent Holman, or 2) that the Complainant should have called Special Agent Holman to meet its burden of proof. If the Appellant wanted to call Special Agent Holman to make its case, it had the responsibility to do so. In the Matter of Carr, FAA Order No. 98-2, at 7 (1998); In the Matter of Parks, FAA Order No. 92-3, at 4 (1992). The fact that the Complainant chose not to call Special Agent Holman should not draw a negative inference as to what his expected testimony would be. See e.g., Administrator v. James, NTSB Docket No. EA-4631, at footnote 4 (1998). The ALJ found that the Complainant met its burden of proof in presenting its case through Special Agent Farris and the exhibits she introduced. Initial Decision at 5. For the Appellant to argue that the Complainant failed to have met its burden of proof goes to the merits of the case and not the calculation of the sanction that Appellant admits is the sole issue upon appeal.

Appellant argues that Special Agent Beverly Farris' testimony was not credible or probative. The ALJ stated, "I find that Special Agent Farris accurately applied the rules in FAA Order No. 2150.3B, Appendix C to calculate the appropriate civil penalty for Mole-Master's violations of the HMR at the time she made her recommendation to the agency's Atlanta office." Initial Decision at p. 6. The Judge, therefore, made his decision based upon the credibility of Special Agent Farris. An ALJ's credibility determinations are not lightly overturned, given that the ALJ had the opportunity to observe the witnesses' demeanor. In The Matter of Siddall, FAA Order No. 2008-9 at 2 (October 7, 2008), *citing*, In the Matter of Gotbetter, FAA Order No. 2000-17 at 9 (August 11, 2000). The courts have stated that they will overturn credibility determinations only if "exceedingly improbable testimony" has been credited, the credited testimony was "impossible under the laws of nature," or "a reasonable adjudicator would be compelled to a contrary conclusion." United States v. Johnson, 519 F.3d 478, 482 (D.C. Cir.

2008); United States v. Tyler, 512 F.3d 405, 411 (7<sup>th</sup> Cir. 2008); Osonowo v. Mukasey, 521 F.3d 922, 927 (8<sup>th</sup> Cir. 2008). The testimony of Special Agent Farris does not meet these criteria to be overturned.

The Complainant's witness stated that she did not personally calculate the penalty using the Sanction Guidance Table, but that the investigating agents have a matrix that they all use the same way. (TR. 98:10). She further testified that in this case the Sanction Guidance was used to determine the sanction. (TR. 78:22). Although the violation in this case occurred on February 14, 2007, the Sanction Guidance Table From FAA Order 2150.3B was offered as Hearing Exhibit A-7. For violations occurring on or before October 1, 2007, FAA Order 2150.3A was applicable. The analysis, however, for the determination of the appropriate sanction is the same whether 2150.3A or 2150.3B is used. The difference in the tables when applied to the present case is range of the possible sanction where 2150.3B extends the upper range of the sanctions. (In the case of a Category B.II case from a maximum penalty of \$7,500 to \$8,200). The Judge was correct to have applied the Sanction Guidelines to this case as did the reporting special agent in this case when he applied those guidelines found in 2150.3A. The comparison made by witness Beverly Farris in using 2150.3B would not have changed the outcome of the sanction from the application of the guidance made by reporting Special Agent Kenneth Holman. As with FAA Order 2150.3B, the Sanction Guidelines found in 2150.3A provide "a general framework for agency personnel in the exercise of ...prosecutorial discretion" and was designed to "aid the analysis of the facts and circumstances of each case so as to arrive at an appropriate sanction in light of the statutorily defined penalty considerations." (FAA Order No. 2150,3A, Change 26, Appendix 6, dated April 14, 1999, as amended by Change 30, dated November 15, 2001.) On February 14, 2007, Respondent offered one (1) undeclared shipment

of Class 3, Packing Group II, Adhesives. Under the Sanction Guidelines, such a flammable liquid is a Risk Category "A" material.<sup>2</sup> Five (5) offense categories were applicable: shipping papers, labels, marking, packaging, and emergency response. Under the Sanction Guidelines, maximum weight is applicable for offering a Risk Category "A" material. The record in this case establishes that Mole-Master is a business entity (Category B) and the Offense Category is II. (Undeclared Shipment Within Hazmat Quantity Limitations). Accordingly, Respondent is subject to a range \$1,500 - \$7,500 for each offense category violated. Using the maximum of the civil penalty range for each of the five offense category "groups," the undeclared February 14 shipment warranted a penalty of  $(5 \times \$7,500) = \$37,500$ . Accordingly, the Complainant submits that a further reduction in sanction would be wholly inappropriate.

The cases cited by the Appellant in its appeal brief are inapposite to the facts and issues of this case. The cases cited were all decided prior to adoption of our present sanction guidance tables and prior to the establishment of our present sanction policy. Accordingly, the Appellant's citations cannot be used as reliable precedent.

Appellant's last argument is simply that the penalty is excessive, and Appellant attempts to compare and distinguish the penalty to that found in several citations. Appellant, however, does not develop the comparison between the facts in those cases and our present case. "[I]t is often difficult to compare sanctions across cases because there are so many variables involved in each case." In the Matter of: American Air Network, Inc., FAA Order No. 2008-10 at 39 (October 7, 2008), *citing* In the Matter of Pacific Aviation International, FAA

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<sup>2</sup> The Sanction Guidelines define a Risk Category "A" material as "materials that when released in the confines of an aircraft can potentially have a catastrophic effect on the aircraft's ability to continue safe flight, resulting in a crash or emergency landing causing injury or death to passengers and flightcrew, as well as persons on the ground." FAA Order No. 2150.3A, Change 26, Appendix 6, p. 18. (Attached hereto as Exhibit A).

Order No. 1997-8 at 3 (February 20, 1997), *dismissed for lack of prosecution*, Pacific Aviation International v. FAA, No. 97-1298 (9<sup>th</sup> Cir. June 11, 1997). Rather, the analysis is whether the sanction sought by Complainant and assessed by the ALJ is consistent with guidance provided in the Compliance and Enforcement Program under the Sanction Guidance Table. American Air Network, at 38.<sup>3</sup> When determining an appropriate civil penalty for a violation of the FAR, the ALJ should refer to the FAA's Sanction Guidance Table, set forth in FAA Order No. 2150.3A, Appendix [C]. In the Matter of: EASTERN AIR CENTER, INC., FAA Order No. 2008-3 at p.9 (January 28, 2008). Complainant has the burden of justifying the amount of the civil penalty it seeks. Commonly, this is done by offering testimony and exhibits to show the amount sought was calculated in compliance with the FAA's Sanction Guidance, FAA Order 2150.3A, after consideration of the tripartite factors set forth in 49 U.S.C. § 5123(c)<sup>4</sup> or both. See, e.g., In the Matter of Envirosolve, LLC, FAA Order No. 2006-2 (February 7, 2006). The Complainant clearly met this burden of proof and the ALJ clearly considered these requirements. Initial Decision, p. 6-7. The ALJ correctly concluded that the Complainant met these requirements.

The Agency has correctly applied its policy in setting the sanction here. The ALJ's reduction of the sanction without justification as to why the middle of the sanction range should be used as opposed to the upper range as mandated by the Agency's sanction guidance is error. The Administrator has both the authority and duty to impose the FAA's policy on

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<sup>3</sup> Although American Air Network involves violations of the Federal Aviation Regulations, as opposed to the violations of the Hazardous Material Regulations for our present case, the use of the Sanction Guidance Tables to determine sanction is appropriate in both cases. FAA Order 2150.3B, Chapter 2, Paragraph 4.b.(3), page 2-5, instructing FAA investigating personnel to use the Sanction Guidance Table found in Appendix C for hazardous material cases and Appendix B for other cases.

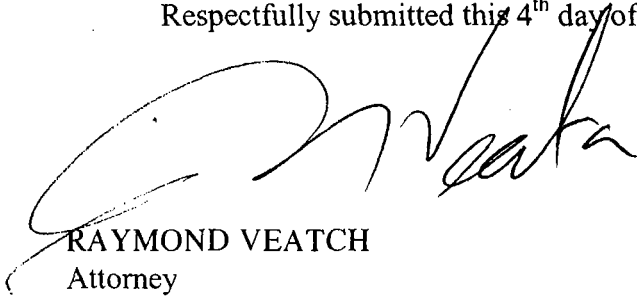
<sup>4</sup> 49 U.S.C. § 5123(c) Penalty considerations. In determining the amount of a civil penalty under this section, the Secretary shall consider--(1) the nature, circumstances, extent, and gravity of the violation; (2) with respect to the violator, the degree of culpability, any history of prior violations, the ability to pay, and any effect on the ability to continue to do business; and (3) other matters that justice requires.

appeal. (*In the Matter of: Warbelow's Air Ventures, Inc.*, FAA Order No. 2000-3, February 3, 2000.) See, e.g., *In the Matter of [Air Carrier]*, FAA Order No. 1996-19, June 4, 1996, stating "if the law judge does not follow agency policy, the agency may impose that policy by reversing the law judge's decision on appeal (citing *Association of Administrative Law Judges v. Heckle*, 594 F. Supp. 1132, 1141 (D.D.C. 1984)).

The foregoing analysis shows that the findings of fact are supported by the evidence; the conclusions of law are in accordance with law, precedent or policy; and that the ALJ did not commit prejudicial errors.

WHEREFORE, the Complainant respectfully requests that the Appellant's appeal be denied and that the ALJ's decision be affirmed.

Respectfully submitted this 4<sup>th</sup> day of May, 2009.



RAYMOND VEATCH  
Attorney  
Office of the Regional Counsel

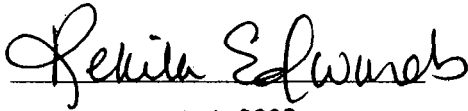
**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the foregoing Complainant's Reply Brief In the Matter of Mole-Master Services Corporation, FAA Docket No. CP08SO00012, via FedEx to:

Jim Bennett Esq.  
General Counsel  
Mole-Master Services Corporation  
Legal Department  
27811 State Route 7  
Marietta, OH 45750

and the original and one copy by to:

Federal Aviation Administration  
ATTN: Hearing Docket Clerk, AGC-400  
800 Independence Ave., SW  
Wilbur Wright Building, Suite 2W1000  
Washington, DC 20591



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Date